UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	Case No. 02-13533(AJG)
WORLDCOM, INC., et al,	July 11, 2006 10:00 a.m.
Reorganized Debtors.	New York, New York

FINAL TRANSCRIPT
DIGITALLY RECORDED PROCEEDINGS
(Excerpt -- Parus Holdings, Inc.)

Pre-Motion Discovery Conference re Claims of Parus Holdings, Inc.

B E F O R E:

THE HONORABLE ARTHUR J. GONZALEZ
United States Bankruptcy Judge

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(Whereupon, the following is an excerpt from 7/11/2006 In re WorldCom, Inc., et al, Case No. 02-13533).

JUDGE GONZALEZ: Please be seated.

The WorldCom matters.

MR. SHAIKEN: Good morning, Your Honor. Mark Shaiken of Stinson Morrison Hecker representing the Reorganized Debtors.

The first item on the contested docket this morning is the informal conference in the Parus Holdings matter, and my colleague Allison Murdock is handling that.

MS. MURDOCK: May it please the Court, I am Allison Murdock appearing on behalf of the Debtors.

Your Honor, MCI requests today permission to file a motion for protective order under Rule 26(c) to shift some or all of the costs of electronic discovery in the matter to Parus Holdings or for an order that the electronic discovery that Parus Holdings is seeking not be had.

When the parties last appeared before you on discovery issues, counsel advised the Court that we were just beginning to undertake the factual analysis that would be necessary in order to determine the appropriateness of shifting the costs of electronic

discovery in this matter.

MCI believes that the factual record necessary for the Court to make a cost shifting determination now has been completed and that there is ample evidence that supports the shifting of costs of electronic discovery to Parus Holdings.

By way of very brief background, Parus Holdings has asserted claims against MCI and a subsidiary Intermedia allegedly arising out of a contract between Intermedia and Parus Holdings' predecessor EffectNet. In November of 2000, Intermedia and EffectNet entered into what was called a Unified Communications Services General Agreement, which the parties in shorthand referred to as the UC Contract. Under the UC Contract, Intermedia was to purchase unified messaging services from EffectNet for resale to Intermedia's customers.

As set forth in the summary judgment papers that MCI has filed in this matter, EffectNet terminated the UC Contract in April of 2002. MCI filed summary judgment last fall because it believes that all of the Parus Holdings' claims, both those sounding in contract and in tort, can be resolved as a matter of law based on the plain language of the UC Contract that controls.

Now, as counsel advised during the last hearing on discovery issues, Parus Holdings had just provided to MCI a list of search terms and individual names that Parus Holdings wanted MCI to use in searching the electronic data of MCI and Intermedia. MCI in turn provided Parus Holdings' search terms and individual key names to the vendor that is assisting us with electronic discovery to attempt to get a cost estimate as to electronic discovery based on the actual search terms that Parus Holdings wanted us to use. That estimate came back to us in the range between $208,000 to $331,000 just in costs to perform the electronic data searches that Parus Holdings was requesting. Because of those costs associated with electronic discovery, we sought an informal conference to seek permission to file a motion to stay discovery while the Court considered our motion for summary judgment, and when the Court did not entertain our request for informal conference, we proceeded with electronic discovery.

Our electronic discovery efforts had been related both to MCI and Intermedia for electronic data and data that is considered both accessible and inaccessible. We recognize that under controlling authority, cost shifting is appropriate only for that

electronic data that is viewed as being inaccessible, and the cost shifting motion that we seek to file would be limited accordingly.

Now, Mr. Friedman has suggested in a letter recently written to the Court that MCI has undertaken no electronic discovery efforts to date. On the contrary, in addition to the electronic discovery that we have done with respect to MCI and Intermedia's accessible electronic data, MCI, consistent with the controlling authority, also has now sampled the inaccessible electronic data. In fact, Parus Holdings is the one that chose the tapes that would be sampled for purposes of the electronic discovery cost shifting analysis. Parus Holdings selected four backup tapes that it wanted sampled for purposes of determining the cost shifting issue. For technical reasons related to one of the tapes that Parus Holdings selected, we actually sampled five additional tapes for a total of nine tapes.

The search of just those nine tapes alone, using Parus Holdings' search terms and the key names that they had identified, pulled in for review approximately 750,000 pages of documents, which is the equivalent of 300 boxes of documents. That number is actually after we had conferred with Parus Holdings'

counsel, Mr. Kevin Smith, to limit the search terms that were being used by Parus Holdings, and of these 750,000 pages, only about 3.28 percent were even responsive to Parus Holdings' request. I think counsel would agree that it is a fair characterization that even those documents that were responsive don't really move the case forward in any meaningful way.

The cost that was associated with just the sampling of these nine tapes that were selected by Parus Holdings was $72,000 just for the sampling alone. This doesn't take into account any of the attorney review time necessary to review the documents that were pulled as a result of the searches.

JUDGE GONZALEZ: One second, please. I am getting a little confused as to why we are here today. It seems to me that this was an informal conference dealing with discovery and the scheduling order for a contested matter and you have requested a hearing date. What is your request?

MS. MURDOCK: MCI also requested an informal conference seeking permission to file a motion for cost shifting under Rule 26(c). That was in our June 16th letter to the Court that is identified on the docket.

JUDGE GONZALEZ: If that request is granted to

schedule the cost shifting or, alternatively, the protective order, that impacts the scheduling order, doesn't it?

MS. MURDOCK: Yes, it does, Your Honor. We submit that it is premature at this time to enter a scheduling order in the case, because of the volume of electronic discovery that is yet to be completed and because the Court has not yet had an opportunity to determine whether there should be cost shifting. If the Court were to decide that there should be cost shifting, then it is possible that Parus Holdings would decide to limit the requests, if it is required to pay for some of the discovery it is seeking, or that it might not want the discovery. So under the legal authority that usually controls the cost shifting cases, sampling is done and the Court considers whether there should be cost shifting. Once that decision is made, then the parties proceed to complete the remainder of the electronic discovery.

JUDGE GONZALEZ: Let me then hear from Parus Holdings with respect to the request to schedule a hearing on the issue of the cost shifting and protective order.

MR. FRIEDMAN: Good morning, Judge. Robert Friedman of Kelley, Drye & Warren for Parus Holdings.

Just to give the entire chronology of this motion, the genesis of this conference is our application to the Court for a scheduling order. We want to move this case forward with discovery. It has been pending for over three years now. The claims objections were fully briefed two years ago. Each time we try to start discovery, there is another attempt by the Debtors to stop discovery and impede, in our view at least, the resolution of this matter.

First, as you are aware, when we made a motion to compel hard copy documents last year, that is when after two and a half years of the case pending they first filed a motion for summary judgment. After that was fully briefed, we had discussions with the Debtors and were trying to get electronic documents. We don't have any documents relating to the most crucial areas. What we believe then is that we should move discovery forward. They should be required to produce whatever documents we have requested that are relevant to this case, and I will mention a few as examples. In response to that, Judge, we have a cost shifting application. It is just another step that we are seeing in an effort to delay discovery.

JUDGE GONZALEZ: Let me ask you this question. If I don't take up the cost shifting, are you willing

to assume the risk or is your client willing to assume the risk, that when do take it up, I may determine that it should be borne or should have been borne by your client?

MR. FRIEDMAN: Your Honor, I don't think we are there yet. We don't have a factual basis to even have the cost shifting question come up right now under Zubulake, and I can explain why. That is why I can't answer that question yet. Under Zubulake there were several things that had occurred which predated even the cost shifting inquiry. Number one, there was extensive fact discovery and extensive record and depositions of the key IT people as to the efforts that were made to preserve documents. Here we have none of that. In fact, we specifically do not have any depositions of their IT people. We have no idea right now, Judge. I have no idea how they have maintained their electronic documents. They have submitted no facts. All we have are assertions relating to searches of backup tapes. That is number one. Number two, in Zubulake the most crucial witness, who was the supervisor of Mrs. Zubulake, it was an employment case, all of that person's e-mails and the backup tapes had already been produced. Here we have nothing. The way the Debtors keep their

records, we can't search the most relevant actors so that that can be produced without cost shifting. Right now any cost shifting inquiry, even by the Court, is premature right now, because we have no factual record. So I think it is a fair question by the Court, and I think that is the ultimate question that can be asked. But I think it is premature at this point.

JUDGE GONZALEZ: If it is premature at this point and it ultimately matures and then goes to a hearing, the consequences could be that the costs get shifted for what would have then taken place. I am just speaking without firsthand knowledge of really what the processes would be. But at least theoretically, it seems to me, if we go down that path and three months or two months or six months from now, whatever the time frame is, the cost shifting application issue arises again and the facts demonstrate under the relevant case law that the shift should take place, it wouldn't be prospective necessarily at that point?

MR. FRIEDMAN: I believe it would under Zubulake. There was no retroactive cost shifting that was imposed, and I don't believe there is any decision that I have read that imposes cost shifting

retroactively. If the Court is going to allow them to make a motion, and I think the proper process -- and unfortunately it would impose some delay -- would be for us to depose their IT people.

JUDGE GONZALEZ: I am sorry to interrupt you. I almost need a motion to determine whether or not this is premature in some respects.

MR. FRIEDMAN: But in any event, we would be entitled, I think, before consideration of that motion, to depose their IT people, and that would not be subject to any cost shifting. So I think, if the Court is going to allow the Debtors to make the motion, we should do that beforehand and get that out of the way from both standpoints. Because under Zubulake they have to submit anyway a detailed, sworn affidavit from their IT people. When the Court in Zubulake was considering the motion, Judge Scheindlin had depositions of the IT people as well as fact depositions, and it was only prospective from that point.

So while I certainly would like to have a scheduling order and that was our initial application here, if the Court is going to consider any cost shifting inquiry at that point, I submit that it makes the most sense to do this limited IT discovery so we

can actually determine what they have done and what they have not done. One thing that comes to mind immediately is, from our view at least, and I know the Debtors dispute this, we have Intermedia and we have WorldCom. These are two different groups of documents. There are no WorldCom documents, except for maybe possibly a few of what they call POP e-mails. We believe that those documents should have been preserved at the time that they intentionally breached the contract. Instead, they were destroyed and now they are completely inaccessible. We need to inquire as to what the process was at the time that they breached our contract and why they didn't preserve the documents. There are no documents from the WorldCom side possibly, and we need to inquire as to that, because not only could that affect the cost shifting but it could also affect possible sanctions such as adverse inferences and other types of sanctions that we anticipate making based upon what the evidence shows.

JUDGE GONZALEZ: All right. Let me hear from the Debtors with respect to the IT discovery before the motion.

MS. MURDOCK: Your Honor, we have made every attempt to make this process as transparent as

possible. We have identified in correspondence to Parus Holdings' counsel all the different types of electronic data there are both for Intermedia and MCI. We have made eight document productions of electronic data, including document productions of WorldCom documents. Those document productions have been identified as being either from WorldCom or Intermedia. So this has been a transparent process. We have told them everything that exists. We have produced documents from the WorldCom side. No documents have been destroyed. The sampling that has been done with respect to the inaccessible data or the backup tapes is the type of sampling that was contemplated in the Zubulake decision. We believe it is unnecessary for there to be depositions of their IT people in advance of a cost shifting motion, because we can provide affidavits in support of our cost shifting motion that show the various types of discovery and information that we have already provided. This has already been provided to counsel. We can provide it in the form of affidavits, though, if they wish. The notion that it is important to take deposition discovery of the electronic data that exists seems unnecessary in light of the transparent information that we have been providing to Parus

Holdings' counsel over the past six months about all of the sources of electronic discovery.

JUDGE GONZALEZ: Whether the information has been as transparent as you say it is, is one of the central issues. Your affidavits about what may have already been produced doesn't answer the question of how things were kept, and what may have been available at one point in time, and then what happened to it.

MS. MURDOCK: Actually, Your Honor, the affidavits I contemplated would be on the subject you just mentioned. Not what has been produced, but all of the sources of electronic data that are available.

JUDGE GONZALEZ: Under the circumstances of this case, why do you think that would suffice? It is going to be challenged from the outset. They are going to want to take the deposition of the affiant.

MS. MURDOCK: I am sorry, Your Honor?

JUDGE GONZALEZ: They will want to take the deposition of the very party that you are going to provide the affidavit from. So what in the world am I going to do with it? Am I going to just accept it as your affidavit, and they have to file the equivalent of a Rule 56(f) type response to it and say, "We need to take discovery or a deposition of the affiant to find what was kept, how it was kept, and whatever is

set forth is accurate"?

MS. MURDOCK: Apparently, what Mr. Friedman is alleging is that the information that counsel has provided to them about the sources of electronic discovery is incomplete or incorrect and we don't believe it is. We have done a very thorough job in searching for electronic discovery. If the Court believes that it is appropriate to have depositions of the IT people -- and we are not talking about a single person, there would be more than one person involved -- then all that that would provide is the scope of the discovery that is out there to access. It doesn't really impact the cost shifting issue. It just impacts where you go to find the electronic discovery.

JUDGE GONZALEZ: Depending on what is discovered, what responses the affiant has to questions as to why something didn't exist and why it did exist and no longer exists or what efforts have been made to search various databases, I don't see how it would be necessarily relevant to the cost shifting. I think it depends on what the answers are.

MS. MURDOCK: In this case, the inaccessible data that we have are backup tapes. I don't think that there is any dispute about that. The cost

shifting issue would go to the inaccessible data.

JUDGE GONZALEZ: It may be my ignorance of all of the facts here, but when someone says their backup tapes, that triggers in my mind an assumption that there were original tapes, and that is why we have backups. So I think there seems to be on the surface a legitimate inquiry as to what happened to the originals. If you had the originals and not the backup, would the search then be enhanced or facilitated? I don't know the answer to that. But if it is determined that the originals under the normal course of business or ordinary course of business in the industry would otherwise have been kept and for some reason it doesn't seem that appropriate actions were taken to retain records and now we then have to turn to the backup, there may be an argument from the party seeking the discovery that they shouldn't have to bear the costs for that. It may come down to whether it was appropriate to have eliminated the original data. I don't know the answer to that. Sitting here right now, I haven't the faintest idea what the standard is. I assume it is an industry-wide standard as to what you would apply coupled with the issues about knowing whether a litigation or having an indication that a litigation may follow as to what

then you do with data and whether or not proper actions were taken to preserve data once it became known that there was an issue that may ultimately end in litigation. I just throw out standards that may be applied, but I don't see how just receiving an affidavit as to WorldCom's point of view as to what happened, what we have, and this is what we have, and we think the costs should be shifted is necessarily going to bring me to a point in which I can make a determination because I am quite confident I am going to hear from Parus Holdings that they still need the discovery based on the representations made in the affidavits.

MS. MURDOCK: All right. Thank you, Your Honor.

JUDGE GONZALEZ: Let me hear then from Parus Holdings.

MR. FRIEDMAN: Judge, I think you are correct with respect to the affidavit. I just wanted to respond on the sampling issue. We were reluctant participants in the sampling process. We still really have very little information as to what they did. We provided search terms and will always be cooperative and provide search terms and limit it. I think that is part of the electronic discovery equation, but the

fact remains that we have targeted narrow groups of documents that are the most relevant to this case that have not been produced. I am not doubting counsel's efforts to attempt to provide the discovery. The fact remains that both Debtors that are involved here had in our view serious problems in maintaining and preserving the documents. The proof is in the pudding. We don't have any documents regarding the most important requests that we have.

JUDGE GONZALEZ: I think we are going to ultimately leave that determination for another day. In terms of taking discovery of the IT people, let me hear from the Debtors first. The Debtors can use the microphone at the table. You don't need to keep jumping up and down. You can use both sides. When would you believe that the relevant parties would be available?

MS. MURDOCK: Your Honor, I would have to check the schedules. I don't know, as I sit here today.

JUDGE GONZALEZ: With it being the summer, it is a little difficult for everyone to come up with a time frame, whether 30 days would be enough to do the depositions and assuming that the parties were accessible. It would seem to me that if you got the depositions completed by mid-August, we could then

have a hearing early in September on this issue. If it turns out that the parties can't coordinate the time, early in September may get pushed to later in September.

What I think you should do is let the Debtors contact the parties that would be involved from the Debtors' standpoint, and get them to give you some information regarding their schedule over the next 30 days. Then you will have to consider your own schedules over that period. Then work out a close of deposition time frame in which you will be ready to make the motion. My guess is the earliest that will take you to is probably mid-September. It may take you until later in September. If you see when you are going through the schedule you can ignore the fact that certain WorldCom dates may be blocked out, to the extent this schedule lands you on a blocked-out WorldCom date, let my chambers know and I will let you know whether that date otherwise can be made available for purposes of the hearing. So don't limit yourselves just to the days that appear on the website as available. Certain days may still be unavailable, but it is likely I can make an adjustment to that schedule. I really think we should leave everything else at this point until that hearing date.

Now, if you have problems coordinating discovery and the deposition of these parties, just contact my chambers and we can have a conference call to try to work out whatever scheduling issue arises. Is there anything further?

MR. FRIEDMAN: No, Your Honor. Thank you.

MS. MURDOCK: Thank you, Your Honor

JUDGE GONZALEZ: All right. Mr. Shaiken, what time is the next matter?

MR. SHAIKEN: At 10:40.

JUDGE GONZALEZ: All right. I will come back to the bench at 10:40. Thank you.

(Whereupon, from 10:26 a.m. to 10:42 a.m. a recess was taken.)

C E R T I F I C A T E

STATE OF NEW YORK)
: SS:
COUNTY OF NEW YORK)

I, DEBORAH HUNTSMAN, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That the within is a true and accurate transcript from the official electronic sound recording of the proceedings held on the 11th day of July, 2006.

I further certify that I am not related by blood or marriage to any of the parties and that I am not interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 20th day of July, 2006.

DEBORAH HUNTSMAN

DEBORAH HUNTSMAN

PROOFREAD BY HALLIE CANTOR

PRELIMINARY TRANSCRIPT SENT VIA E-MAIL 7/16/2006

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